IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.11.2007

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

W.P.No.34248 of 2007
M.P.No.1 of 2007

M/s.Apple Health Care Supplies,
rep. By its Proprietrix ... Petitioner

vs.

1. The Appellate Assistant Commissioner (CT) V,
Collectorate Office, Kancheepuram.

2. The Commercial Tax Officer,
Tambaram II Assessment Circle,
Chennai-44. ... Respondents

Writ petition is filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorarified Mandamus, to call for the records of the first respondent in its proceedings in S.P.No.94 of 2007 in A.P.(CST)No.84 of 2007 CST 2002-03 and quash the order dated 28.09.2007 and grant absolute stay and further direct to dispense with the filing of security.

For Petitioner : Mr.V.Sundareswaran

For Respondents : Mr.R.Mahadevan,
Addl. Govt. Pleader

O R D E R

The petitioner has challenged the order of the Appellate Assistant Commissioner granting interim stay of Original Order of Assessment, imposing certain conditions.

2. The petitioner has submitted that they are dealers in intra-ocular lenses and as per Commissioner's clarification dated 27.03.2002, sale of intra-ocular lenses fall under Item 2(4) of Part B of the 3rd Schedule to the TNGST Act and they are exempt from tax. The first sale of intra-ocular lenses inside the State attracts 10% rate of tax under Entry 19 sub-item 5(a) of Part C of the First Schedule to the TNGST Act. However, by virtue of Item No.2(4) of Part B of the 3rd Schedule read with the notification dated 27.03.2002 stated supra, the first sale inside the State is exempted from tax. The petitioner has further submitted that as per Section 8(2-c) of the CST Act, where the sale or, as the case may be, purchase of which is, under the Sales Tax Law of the appropriate State, exempt from tax generally, then by operation of law, the sale of very same goods under the CST Act, 1956 is

also exempted.

3. The petitioner has further contended that while that be the legal position that the assessment order itself is contrary to the statutory provision. Aggrieved by the assessment order dated 23.12.2005, for the years CST 2002-03 and CST 2003-04, the petitioner filed an appeal before the first respondent and in S.P.No.95 of 2000 in A.P.No.85 of 2007, dated 28.09.2007, the appellate authority granted stay subject to the following conditions:
"(i) To pay tax of Rs.86,224/- (Rupees eighty six thousand two hundred and twenty four only) to the Assessing Officer on or before 29.10.2007.
(ii) To furnish sufficient security in the form of Bank Guarantee/Immovable property to the satisfaction of the Assessing Officer on or before 29.10.2007 for the balance amount of tax of Rs.1,72,449/- and penalty of Rs.5,17,347/-, totaling of Rs.6,89,796/- (Rupees six lakhs eighty nine thousand seven hundred and ninety six only)."

4. Challenging the conditional order of stay, the petitioner has preferred the present Writ Petition contending inter alia that when the assessment order itself is void ab initio, in view of the clarification dated 27.03.2002 read with Section 8(2-c) of the CST Act, the appellate authority ought to have exercised his jurisdiction judiciously and should not have imposed stringent conditions as stated supra. It is the further case of the petitioner that in view of the amendment in G.O.Ms.No.331, dated 10.10.1994, published in the Official Gazette on 02.11.1994, brought about by legislature omitting the expression "personal bond" in Sub Rule (1) of Rule 31 of the TNGST Rules and due to Financial constraint, the petitioner is unable to offer Bank Guarantee as directed by the appellate authority. As the goods sold by the petitioner are exempt from tax, the petitioner seeks a Writ of Certiorari to quash the conditional order of stay.

5. Considering the limited prayer in the Writ Petition, Mr.R.Mahadevan, learned Additional Government Pleader was put on notice and heard. He submitted that the appellate authority, while considering the facts and circumstances of the case, has granted interim stay, subject to the conditions stated supra and there is no need to modify the same.

6. Heard the counsel for the parties and perused the materials available on record.

7. While passing the assessment order, the second respondent has considered the objection of the petitioner and observed that as there was no exemption granted under Section 8(5) of the CST Act, in respect of the goods under Inter-State sale, viz., sale of intra-ocular lenses and in the absence of any notification issued under the CST Act, 1956, the petitioner is not eligible for exemption on the turnover of Inter-State sales. Entry under Part B of the Third Schedule would be relevant and reads as follows:

"The following items were notified by the Government in G.O.Ms.No.30 CT (B1), dated 27.03.2005, Not No:II(I)/CT/19(b-3)/2002 gazette dated 27.03.2002 Effective from 27.03.2002.
NOTIFICATION
1. Electrical hearing aids.....
2. Simple spectacles .....
3. Crutches, wheel chairs .....
4. Intra-ocular lenses.
5...

8. In view of the fact that the intra-ocular lenses is exempt from tax and taking note of Section 8(2-C)

of the CST Act, I am of the considered view that the petitioner has made out a prima facie case, and when the issue is pending before the appellate authority as regards the liability of the petitioner to pay the penalty, it would not be appropriate to impose stringent conditions on the petitioner. Having regard to the submissions that the petitioner has already paid 25% of the disputed tax and complied with the first condition imposed in the conditional order of stay and the financial constraint expressed by the petitioner, it is suffice that the the petitioner is directed to offer sufficient security in form of personal bond to the satisfaction of the assessing officer, in respect of the amounts due and payable towards balance of tax at Rs.1,72,449/- and penalty of Rs.5,17,347/-, totaling of Rs.6,89,796/- (Rupees six lakhs eighty nine thousand seven hundred and ninety six only), within a period of three weeks from today, failing which, the Writ Petition stands dismissed without further reference to this Court.

9. With the above direction, the Writ Petition is disposed of. No costs. Consequently, connected Miscellaneous Petition is also closed.

14.11.2007
NOTE TO OFFICE:
Issue on 14.11.2007
skm

S. MANIKUMAR, J.
skm

To
1. The Appellate Assistant Commissioner (CT) V,
Collectorate Office, Kancheepuram.

2. The Commercial Tax Officer,
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